(3)

NO. 91-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ESTATE OF FLOYD COWART,
Petitioner

v.

NICKLOS DRILLING COMPANY and
COMPASS INSURANCE COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS NICKLOS DRILLING COMPANY and COMPASS INSURANCE COMPANY

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STATEMENT

The statements of the case contained in the petition filed by Petitioner Cowart and in the brief in opposition for the Federal Respondent are generally correct. However, the assertion by Petitioner that Respondent Nicklos

1. There are no parent or subsidiary companies to be listed for Respondent Nicklos Drilling Company in compliance with Supreme Court Rule 29.1. Respondent Compass Insurance Company is a subsidiary of Armco Steel Corp.

failed to pay LHWCA[2] benefits to Cowart after acknowledging liability therefor and being "instructed by the Director to pay said benefits" [Pet. 7-8] is not correct.

Cowart made a claim against his employer (Nicklos) and its carrier (Compass) for benefits under LHWCA for an accidental injury sustained on July 20, 1983, and also filed a civil suit against a third party in the U. S. District Court for the Eastern District of Louisiana seeking to recover damages for the same accidental injury. The carrier paid Cowart benefits for temporary total disability from the date of the injury until May 21, 1984, when he was released to return to work. These payments were voluntary, pursuant to 33 U.S.C. § 914(a), and no formal compensation award was made. Despite Petitioner's assertion that Cowart was "automatically entitled" to additional benefits, his employer and carrier never acquiesced in any such claim, and no formal claim to such effect was ever presented by Cowart to the Department of Labor after voluntary benefits were terminated and before he had consummated his third party settlement over thirteen months later. Cowart settled his third party suit on July 1, 1985 without obtaining the written approval of the employer or carrier as required by 33 U.S.C. § 933(g).

ARGUMENT

There is no conflict among the Circuits on the issue presented by this petition. Only the Fifth Circuit has

2. Longshore and Harbor Workers' Compensation Act, 933 U.S.C. § 901, *et seq.*

published an opinion addressing the issue.[3] The only real "conflict" arises out of the persistent effort of the Director of the Office of Workers' Compensation Programs to delete, or at least dilute, the language of Section 33(g) of the LHWCA (33 U.S.C. § 933(g)). In this effort, the Director has found a compliant agency in the Department of Labor's Benefits Review Board.

The BRB's seminal case on the issue[4] is *Dorsey v. Cooper Stevedoring Co., Inc.*, 18 B.R.B.S. 25 (1986). In *Dorsey*, the BRB articulated a construct of § 933(g) which holds that its two subsections apply to distinct situations: The applicability of § 933(g), subsection (1), is contingent upon the condition that the employee is receiving LHWCA benefits *at the time* of a third party settlement; otherwise, subsection (2) applies. Furthermore, this construct holds that only a "subsection (1) employee" is required to comply with the "written approval" requirement, whereas a "subsection (2) employee" is given the option of merely notifying his employer and its carrier that he has made such a settlement. *Id.*, 18 B.R.B.S. at 29. The BRB rationalizes this con-

3. As demonstrated in the brief in opposition for the Federal Respondent filed by the Solicitor General, there is no conflict between the holding of the Fifth Circuit in the present case and the Ninth Circuit's opinion in *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558 (9th Cir. 1990). Brief for Federal Respondent, 9-10.

4. Subsequent to the 1984 amendments to the LHWCA, that is. A case extensively discussed by Petitioner, *O'Leary v. Southeast Stevedoring Co.*, 7 B.R.B.S. 144 (1979), aff'd mem., 622 F.2d 595 (9th Cir. 1980), was decided before Congress amended § 33(g) in 1984 to impose the notice requirement on settling employees and to make the forfeiture-of-benefits rule applicable "regardless of whether the employer * * * has made payments or acknowledged entitlement to benefits under this [chapter]. O'Leary was decided on the basis of the predecessor version of § 33(g), before subsection (2) was added by amendment.

struct by interpreting the phrase in the first sentence of § 933(g)(1)—"person entitled to compensation"—to mean "one who is receiving compensation payments voluntarily at the time he settles his claim with a third party"; and further by construing the subordinate clauses joined by the conjunction "or" in § 933(g)(2) as affordinging the employee an option of eschewing compliance with the "written approval" requirement and substituting simple notice to the employer/carrier instead. *Id.*, 18 B.R.B.S. at 29-31.

The Fifth Circuit rejected this construct in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644 (5th Cir. 1986). In that case the BRB had affirmed an Administrative Law Judge's order awarding future compensation benefits to a claimant notwithstanding his failure to obtain approval of his employer and its carrier of a settlement of a third party liability action. The claimant in *Collier* contended that the requirement of § 933(g) was "suspended" because his employer and the carrier had contractually waived their own subrogation rights against the third party tortfeasor. The Fifth Circuit pointed out that there is nothing in the language of § 933(g) to support an exception to the "unqualified requirement that an employee obtain the consent of the employer and carrier for any settlement with a third party tortfeasor", adding the following comment:

> * * * To the contrary, § 933(g)(1) is brutally direct: 'the employer shall be liable for compensation . . . *only* if written approval of the settlement is obtained from the employer and the employer's carrier' (emphasis added).

784 F.2d at 647.

Undaunted, the BRB refused to follow *Collier* in the present case, complaining that the Fifth Circuit had failed to consider "[t]he changes made in § 933(g) in 1984 with the addition of § 933(g)(2) and their effect on claimants who were not paid benefits voluntarily or pursuant to an award * * *." Decision and Order of the BRB, p. 4. Actually, the Fifth Circuit expressly discussed § 933(g)(2) in its opinion in *Collier* and found the language of that subsection to be reinforcing of its holding in that case:

> * * * As if the language of § 933(g)(1) weren't clear enough, the mandatory nature of the written approval requirement is reiterated in § 933(g)(2), *so that the two provisions frame an unmistakable scheme* * * *.

784 F.2d at 647 (emphasis added). Moreover, the Fifth Circuit went on in its opinion to quote directly from the legislative history of the 1984 amendments to the LHWCA and observe that it "admits no exception to the written approval requirement". *Id.*

The BRB's construct of § 933(g) is fraught with logical and semantical flaws. In the first place, if a claimant is not a "person entitled to compensation" at the time of his third party settlement, by what alchemy does he thereafter acquire entitlement to compensation for a claim arising out of the same injury? (In the present case, the ALJ found that Cowart had a scheduled injury which "automatically entitled" him to additional benefits for a period of seventy-five weeks commencing on May 22, 1984, but then determined that he was not a "person entitled to compensation" at the time he confected his third party settlement fifty-eight weeks later on July 1,

1985. Decision and Order of the A.L.J. of November 25, 1986 at p. 3). From this inconsistency alone, the suggested interpretation of this phrase makes poor sense.

By the same token, while the BRB asserted in *Dorsey* that its "disjunctive alternative" reading of § 933(g)(2) is necessary to avoid rendering the "notification" phrase mere surplusage, *Id.*, 18 B.R.B.S. at 30, in fact the grammatically sound interpretation is that the claimant is obliged to do both, i.e., obtain "written approval" *and* give notification, and that the failure to do one or the other yields the result that "all rights to compensation and medical benefits under this chapter shall be terminated * * *." The "notification" requirement extends to both settlements *and* judgments rendered against third persons, which suggests its distinct purpose: The employer/carrier's written approval is of no effect in the case of a *judgment* against a third party, but *notice* of such recovery is necessary in order to claim the offset allowed by § 933(f).

In this case as in its prior decision in *Collier*, the Fifth Circuit has rejected out-of-hand the contention of Petitioner that there can be *any* exceptions to the "written consent" requirements of § 933(g) and accordingly held that it would "tolerate the engraftment of none by the BRB." "Engraft" is an apt choice of words, for this is plainly what Petitioner, the BRB and the Director would have the Court do, i.e., engraft an exception upon the "written approval" requirement of § 933(g) which is not to be found on the face of the statute. The wording of § 933(g) is, as the Court said in *Collier*, "brutally direct," and there is nothing in the legislative history which suggests that Congress intended anything other than precisely what it said. 784 F.2d at 647.

All of Petitioner's laments about the alleged deleterious impact of this statutory procedure upon LHWCA claimants in various circumstances, and the appeals to what Petitioner perceives as the better operation of the LHWCA, reveal that Petitioner's real quarrel is with the statute itself. Along with the Director and the BRB, Petitioner does not like the "written approval" requirement of § 933(g). Petitioner's argument is properly addressed to Congress, because whether or not there is a good reason for the procedure to be as it is, the Fifth Circuit is plainly correct in the discharge of its duty by applying the statute as it is written.

CONCLUSION

This is not a case presenting an issue which is subject of conflicting decisions in the lower federal courts, nor does it involve a matter of statutory ambiguity, nor is there any legislative history suggesting the basis for a judicial gloss upon the unvarnished wording of the statutory provision in issue. The Fifth Circuit properly rejected the invitation to effectively rewrite the congressional act by adopting the distorting administrative construct contended for by Petitioner, and previously urged by the Director and adopted by the B.R.B. The necessity for the exercise of this Court's jurisdiction has not been demonstrated by the petition for writ of certiorari, and the petition should be denied.

Respectfully submitted,

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